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CLERK US DISTRICT COURT DISTRICT OF NEVADA	
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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

-oOo-

United States of America,

Plaintiff,

vs.

Brian Vanderburgh,

Defendant.

Case No.: 2:16-cr-228-JAD-GWF

Plea Memorandum

Plaintiff United States of America, by and through Daniel G. Bogden, United States Attorney, and Kathryn C. Newman, Assistant United States Attorney, defendant Brian Vanderburgh, and his attorney, Michael Miceli, Esq., submit this Plea Agreement under Fed. R. Crim. P. 11(c)(1)(A) and (B).

I. SCOPE OF AGREEMENT

The parties to this Plea Agreement are the United States of America and Brian Vanderburgh (the defendant). This Plea Agreement binds the defendant and the United States

1 Attorney's Office for the District of Nevada. It does not bind any other prosecuting,
2 administrative, or regulatory authority, the United States Probation Office, or the Court.

3 The Plea Agreement sets forth the parties' agreement regarding criminal charges
4 referenced in the Plea Agreement and applicable sentences, fines and restitution. It does not
5 control or prohibit the United States or any agency or third party from seeking any other civil or
6 administrative remedies directly or indirectly against the defendant.

7 **II. DISPOSITION OF CHARGES AND WAIVER OF TRIAL RIGHTS**

8 A. Guilty Plea. The defendant knowingly and voluntarily agrees to plead guilty to a
9 Count One of the Indictment charging him with Conspiracy to Commit Wire Fraud in violation
10 of Title 18, United States Code, Section 1349.

11 B. Waiver of Trial Rights. The defendant acknowledges that he has been advised
12 and understands that by entering a plea of guilty he is waiving -- that is, giving up -- certain
13 rights guaranteed to all defendants by the laws and the Constitution of the United States.
14 Specifically, the defendant is giving up:

15 1. The right to proceed to trial by jury on all charges, or to a trial by a judge
16 if the defendant and the United States both agree;

17 2. The right to confront the witnesses against the defendant at such a trial,
18 and to cross-examine them;

19 3. The right to remain silent at such a trial, with assurance that his silence
20 could not be used against him in any way;

21 4. The right to testify in his own defense at such a trial if he so chooses;

22 5. The right to compel witnesses to appear at such a trial and testify in the
23 defendant's behalf; and
24

1 6. The right to have the assistance of an attorney at all stages of such
2 proceedings.

3 C. Withdrawal of Guilty Plea. The defendant will not seek to withdraw his guilty
4 plea after he has entered it in court.

5 D. Additional Charges. The United States agrees not to bring any additional charges
6 against the defendant arising out of the investigation in the District of Nevada which culminated
7 in this Plea Agreement and based on conduct known to the United States. The United States will
8 move to dismiss the remaining counts of the indictment at the time of sentencing.

9 **III. ELEMENTS OF THE OFFENSES**

10 The elements of Conspiracy to Commit Wire Fraud under 18 U.S.C. § 1349 are:

11 1. There was an agreement between two or more persons to commit at least one crime
12 as charged in the indictment, here, Wire Fraud; and

13 2. The defendant became a member of the conspiracy knowing of at least one of its
14 objects and intending to help accomplish it;

15 Fed. Crim. Jury Instructions of the Ninth Circuit § 8.20 (2015 ed.).

16 The elements of Wire Fraud under 18 U.S.C. § 1343 are:

17 1. The defendant knowingly participated in, devised, or intended to devise a scheme
18 or plan to defraud, or a scheme or plan for obtaining money or property by means of false or
19 fraudulent pretenses, representations, or promises;

20 2. The statements made or facts omitted as part of the scheme were material; that is,
21 they had a natural tendency to influence, or were capable of influencing, a person to part with
22 money or property;

23 3. The defendant acted with the intent to defraud, that is, the intent to deceive or cheat;
24 and

1 4. The defendant used, or caused to be used, a wire communication to carry out or
2 attempt to carry out an essential part of the scheme.

3 Fed. Crim. Jury Instructions of the Ninth Circuit § 8.124 (2014 ed.).

4 **IV. FACTS SUPPORTING GUILTY PLEA**

5 A. The defendant will plead guilty because he is, in fact and under the law, guilty of
6 the crimes charged.

7 B. The defendant further acknowledges that his admissions and declarations of fact set
8 forth below satisfy every element of the charged offenses.

9 C. The defendant waives any potential future claim that the facts he admitted in this
10 Plea Agreement were insufficient to satisfy the elements of the charged offenses.

11 D. The defendant admits and declares under penalty of perjury that the facts set forth
12 below are true and correct:

13 1. From in or about November 2010, to in or about June 2011, in the States and Federal
14 District of Nevada, Brian Vanderburgh, did knowingly and willfully combine, conspire and agree
15 with others to transmit and cause to be transmitted by means of wire communications in interstate
16 commerce documents and information for purposes of executing a scheme and artifice to defraud
17 and for obtaining money and property by means of materially false and fraudulent pretenses,
18 representations, and promises, in violation of Title 18, United States Code, Section 1343.

19 2. The objective of the conspiracy and scheme was for defendant and his
20 coconspirators to obtain money and property from Acquest Vegas, LLC, for construction services
21 that were not performed.

22 3. The manner and means by which the objective of the conspiracy were accomplished
23 include, but were not limited to, the following:
24

1 a. The United States sought to build an outpatient clinic in Las Vegas, Nevada
2 to service veterans. Acquest Vegas, LLC, a developer, won the contract. Acquest hired the
3 defendant, Brian Vanderburgh, to act as the Project Manager on the project. Acquest
4 subcontracted the construction to Recreational Development Company ("RDC"), who acted as
5 the General Contractor on the project. RDC and Acquest had a "cost plus" fee arrangement for
6 RDC's services.

7 b. RDC hired subcontractors to perform work on the contract. The subcontractors
8 included Top Notch Services, LLC and Williams Waterproofing. Periodically, RDC would
9 aggregate the invoices it received and submit a Pay Application to Acquest, seeking
10 reimbursement for work completed on the project.

11 b. The defendant's co-conspirator, Jeffrey Whittle, was a Managing Member of RDC.

12 c. The defendant, as the Project Manager for Acquest, was responsible for monitoring
13 progress of construction and ensuring that the work certified as complete on the pay applications
14 was in fact complete. The defendant controlled a company called VDB Consulting and was the
15 sole authorized signor on VDB Consulting's bank account.

16 d. The defendant and his co-conspirators created and caused to be created false and
17 fraudulent invoices from subcontractors Top Notch and Williams Waterproofing, which sought
18 payment for work that had not in fact been done on the project. The fraudulent invoices were
19 bundled with other, legitimate invoices and submitted for payment to Acquest. The defendant's
20 co-conspirator, Jeffrey Whittle, signed the Pay Applications that included the fraudulent invoices
21 or caused the Pay Applications to be signed. The defendant authorized their payment on behalf of
22 Acquest by sending an interstate email from his offices in Nevada to Acquest's offices in New
23 York.

1 e. As a result of the fraudulent invoices and the authorizations and certifications by
2 the co-conspirators, Acquest issued payment on the invoices. The payments went to an escrow
3 company, Nevada Construction Services (NCS) by interstate wire from Acquest's bank account at
4 Wells Fargo to NCS's account with MetLife.

5 f. NCS then wrote checks to RDC for payment on the invoices. RDC deposited the
6 checks and co-conspirators Whittle signed the checks to VDB Consulting Services or caused them
7 to be signed. The defendant deposited the funds in his VDB Consulting account for his own use.
8 On at least eight different occasions the amount of the check written by RDC to VDB Consulting
9 was the exact same amount as the fraudulent invoices submitted to Acquest and authorized by the
10 defendant.

11 g. The defendants created \$151,445 in fraudulent invoices from Top Notch and
12 \$129,620 in fraudulent invoices from Williams Waterproofing. Before the fraud was discovered
13 by Acquest, RDC disclosed the fraudulent Top Notch invoices and returned the fraudulently
14 acquired proceeds through off-sets to the contract. RDC and the co-conspirators never disclosed
15 or returned the \$129,620 fraudulently obtained through falsified Williams Waterproofing invoices.

16 4. In all of the aforementioned actions, defendant Brian Vanderburgh acted with the
17 intent to defraud and with willful blindness regarding the falsity of the submitted invoices.

18 **V. COLLATERAL USE OF FACTUAL ADMISSIONS**

19 The facts set forth in Section IV of this Plea Agreement shall be admissible against the
20 defendant under Fed. R. Evid. 801(d)(2)(A) at sentencing for any purpose. If the defendant does
21 not plead guilty or withdraws his guilty plea, the facts set forth in Section IV of this Plea
22 Agreement shall be admissible at any proceeding, including a trial, for impeaching or rebutting
23 any evidence, argument or representation offered by or on the defendant's behalf. The defendant
24

expressly waives all rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 regarding the use of the facts set forth in Section IV of this Plea Agreement.

VI. APPLICATION OF SENTENCING GUIDELINES PROVISIONS

A. Discretionary Nature of Sentencing Guidelines. The defendant acknowledges that the Court must consider the United States Sentencing Guidelines (“USSG” or “Sentencing Guidelines”) in determining the defendant’s sentence, but that the Sentencing Guidelines are advisory, not mandatory, and the Court has discretion to impose any reasonable sentence up to the maximum term of imprisonment permitted by statute.

B. Offense Level Calculations. The parties stipulate to the following calculation of the defendant’s offense level under the Sentencing Guidelines, acknowledge that these stipulations do not bind the Court, and agree that they will not seek to apply any other specific offense characteristics, enhancements or reductions:

1. Count 1: Conspiracy to Commit Wire Fraud, 18 U.S.C. § 1349

Base Offense Level (USSG § 2B1.1(a)):	7
Loss of \$95,000 to \$150,000 (USSG § 2B1.1(b)(1)(E)):	8
Acceptance (USSG § 3E1.1(a)):	-2
Total Adjusted Offense Level	13

The defendant acknowledges that the statutory maximum sentence and any statutory minimum sentence limit the Court’s discretion in determining the defendant’s sentence notwithstanding any applicable Sentencing Guidelines provisions.

C. Reduction of Offense Level for Acceptance of Responsibility. Under USSG §3E1.1(a), the United States will recommend that the defendant receive a two-level downward adjustment for acceptance of responsibility unless he (a) fails to truthfully admit facts establishing a factual basis for the guilty plea when he enters the plea; (b) fails to truthfully admit facts establishing the amount of restitution owed when he enters his guilty plea; (c) provides

1 false or misleading information to the United States, the Court, Pretrial Services, or the Probation
2 Office; (d) denies involvement in the offense or provides conflicting statements regarding his
3 involvement or falsely denies or frivolously contests conduct relevant to the offense; (e) attempts
4 to withdraw his guilty plea; (g) commits or attempts to commit any crime; (f) fails to appear in
5 court; or (i) violates the conditions of pretrial release.

6 These Sentencing Guidelines provisions, if applied, will result in a total offense level of
7 13.

8 D. Criminal History Category. The defendant acknowledges that the Court may base
9 his sentence in part on the defendant's criminal record or criminal history. The Court will
10 determine the defendant's Criminal History Category under the Sentencing Guidelines.

11 E. Relevant Conduct. The Court may consider any counts dismissed under this Plea
12 Agreement and all other relevant conduct, whether charged or uncharged, in determining the
13 applicable Sentencing Guidelines range and whether to depart from that range.

14 F. Additional Sentencing Information. The stipulated Sentencing Guidelines
15 calculations are based on information now known to the parties. The parties may provide
16 additional information to the United States Probation Office and the Court regarding the nature,
17 scope, and extent of the defendant's criminal conduct and any aggravating or mitigating facts or
18 circumstances. Good faith efforts to provide truthful information or to correct factual
19 misstatements shall not be grounds for the defendant to withdraw his guilty plea.

20 The defendant acknowledges that the United States Probation Office may calculate the
21 Sentencing Guidelines differently and may rely on additional information it obtains through its
22 investigation. The defendant also acknowledges that the Court may rely on this and other
23 additional information as it calculates the Sentencing Guidelines range and makes other
24

1 sentencing determinations, and the Court's reliance on such information shall not be grounds for
2 the defendant to withdraw his guilty plea.

3 **VII. APPLICATION OF SENTENCING STATUTES**

4 A. Maximum Penalty. The maximum penalty for Conspiracy to Commit Wire Fraud
5 under 18 U.S.C. § 1349 is a 20-year prison sentence, a fine of \$1,000,000, or both.

6 B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in
7 18 U.S.C. § 3553(a) in determining the defendant's sentence. However, the statutory maximum
8 sentence and any statutory minimum sentence limit the Court's discretion in determining the
9 defendant's sentence.

10 C. Parole Abolished. The defendant acknowledges that his prison sentence cannot
11 be shortened by early release on parole because parole has been abolished.

12 D. Supervised Release. In addition to imprisonment and a fine, the defendant will be
13 subject to a term of supervised release not to exceed five years. 18 U.S.C. § 3583(b). Supervised
14 release is a period of time after release from prison during which the defendant will be subject to
15 various restrictions and requirements. If the defendant violates any condition of supervised
16 release, the Court may order the defendant's return to prison for all or part of the term of
17 supervised release, which could result in the defendant serving a total term of imprisonment
18 greater than the statutory maximum prison sentence of twenty-five years.

19 E. Special Assessment. The defendant will pay a \$100.00 special assessment per
20 count at the time of sentencing.

21 **VIII. POSITIONS REGARDING SENTENCE**

22 The parties will jointly recommend a below-guidelines sentence of a term of probation
23 for five years. The United States will not seek a fine. The defendant acknowledges that the Court
24 does not have to grant a downward departure based on the defendant's substantial assistance to

1 the United States, even if the United States chooses to file a motion pursuant to 18 U.S.C. §
2 3553(e)(1), USSG § 5K1.1, or Fed. R. Crim. P. 35. This Plea Agreement does not require the
3 United States to file any pre- or post-sentence downward departure motion under USSG § 5K1.1
4 or Fed. R. Crim. P. 35. The United States reserves its right to defend any lawfully imposed
5 sentence on appeal or in any post-conviction litigation.

6 **IX. RESTITUTION**

7 In exchange for the benefits received under this Plea Agreement, the defendant agrees to
8 make full restitution in the amount of \$129,620, to be joint and several with any restitution order
9 to his co-defendant. The defendant cannot discharge this restitution obligation through bankruptcy
10 proceedings.

11 **X. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS**

12 Before or after sentencing, upon request by the Court, the United States, or the Probation
13 Office, the defendant will provide accurate and complete financial information, submit sworn
14 statements, and/or give depositions under oath concerning his assets and his ability to pay. The
15 defendant will surrender assets he obtained directly or indirectly as a result of his crimes, and
16 will release funds and property under his control in order to pay any fine or restitution ordered by
17 the Court.

18 **XI. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS**

19 A. Plea Agreement and Decision to Plead Guilty. The defendant acknowledges that:
20 (1) He has read this Plea Agreement and understands its terms and conditions;
21 (2) He has had adequate time to discuss this case, the evidence, and this Plea
22 Agreement with his attorney;
23 (3) He has discussed the terms of this Plea Agreement with his attorney;
24

1 (4) The representations contained in this Plea Agreement are true and correct,
2 including the facts set forth in Section IV; and

3 (5) He was not under the influence of any alcohol, drug, or medicine that
4 would impair his ability to understand the Agreement when he considered signing this Plea
5 Agreement and when he signed it.

6 The defendant understands that he alone decides whether to plead guilty or go to trial,
7 and acknowledges that he has decided to enter his guilty plea knowing of the charges brought
8 against him, his possible defenses, and the benefits and possible detriments of proceeding to trial.
9 The defendant also acknowledges that he decided to plead guilty voluntarily and that no one
10 coerced or threatened him to enter into this Plea Agreement.

11 B. Waiver of Appeal and Post-Conviction Proceedings. The defendant knowingly
12 and expressly waives: (a) the right to appeal any sentence imposed within or below the
13 applicable Sentencing Guideline range as determined by the Court; (b) the right to appeal the
14 manner in which the Court determined that sentence on the grounds set forth in 18 U.S.C. §
15 3742; and (c) the right to appeal any other aspect of the conviction or sentence and any order of
16 restitution.

17 The defendant also knowingly and expressly waives all collateral challenges, including
18 any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the
19 Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective
20 assistance of counsel.

21 The defendant reserves only the right to appeal any portion of the sentence that is an
22 upward departure from the Sentencing Guidelines range determined by the Court.

23 The defendant acknowledges that the United States is not obligated or required to
24 preserve any evidence obtained in the investigation of this case.

1 C. Removal/Deportation Consequences. The defendant understands and
2 acknowledges that if he is not a United States citizen, then it is highly probable that he will be
3 permanently removed (deported) from the United States as a consequence of pleading guilty
4 under the terms of this Plea Agreement. The defendant has also been advised if his conviction is
5 for an offense described in 8 U.S.C. § 1101(a)(43), he will be deported and removed from the
6 United States and will not be allowed to return to the United States at any time in the future. The
7 defendant desires to plead guilty regardless of any immigration consequences that may result
8 from his guilty plea, even if the consequence is automatic removal from the United States with
9 no possibility of returning. The defendant acknowledges that he has specifically discussed these
10 removal/deportation consequences with his attorney.


11 **XII. ADDITIONAL ACKNOWLEDGMENTS**

12 This Plea Agreement resulted from an arms-length negotiation in which both parties
13 bargained for and received valuable benefits in exchange for valuable concessions. It constitutes
14 the entire agreement negotiated and agreed to by the parties. No promises, agreements or
15 conditions other than those set forth in this agreement have been made or implied by the
16 defendant, the defendant's attorney, or the United States, and no additional promises, agreements
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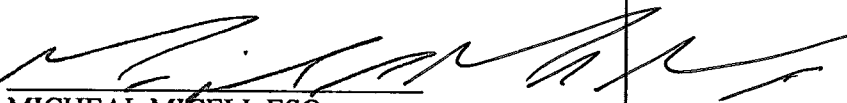
1 or conditions shall have any force or effect unless set forth in writing and signed by all parties or
2 confirmed on the record before the Court.

3 DANIEL G. BOGDEN,
4 United States Attorney


5 DATE 2-27-17

6 
KATHRYN C. NEWMAN
7 Assistant United States Attorney

8 DATE 2-27-17

9 
MICHEAL MICELI, ESQ.
10 Counsel for Defendant Brian Vanderburgh

11 DATE 2-27-17

12 
BRIAN VANDERBURGH
13 Defendant
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